

A critical analysis of the standard of proof in penetrative defilement cases in Zambia

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DOI: <https://doi.org/10.38177/ajast.2024.8215>

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Article Received: 25 March 2024

Article Accepted: 29 May 2024

Article Published: 31 May 2024

ABSTRACT

Standard of proof in penetrative defilement cases is a crucial matter for consideration to achieve equitable justice administration. This study was conducted to establish inadequacies that exist in the criminal justice system in cases that require forensic science involvement to achieve equitable justice administration. Data was collected from institutional records that included Police dockets (n=50), National Prosecutions Authority records (n=40), Court judgements (n=50), Child sexual abuse cases (CSA) (n=7702) from University Teaching Hospital (PCoE) and also from inmates saving sentences for defilement of children and imbeciles (n=50).

Purposive sampling of institutional records between 2016 and 2021 was done and consequently, descriptive statistics (means, medians, ranges etc.) were used to describe populations. SPSS V26 was used for statistical analysis, which produced descriptive and inferential output (Both statistical and graphical). All statistical tests were at 5% significance and confidence levels.

The results of this study showed among other concerns an uncoordinated approach from the players handling penetrative defilement cases involving children ≤ 8 years and imbeciles. Secondly, reluctance by players to embrace scientific/forensic methods (99.5% non-scientific evidence and 0.5% scientific evidence in the sampled cases) in the administration of justice as the standard of proof by seemingly adopting and being satisfied with the crime control model approach as illustrated by Hebert Packer was observed. It can therefore be concluded that in Zambia during the period under review in the study, the administration of justice in penetrative defilement cases was on the balance of probabilities rather than beyond reasonable doubt.

Keywords: Standard of proof; Equitable justice administration; Purposive sampling; Statistical analysis; Penetrative defilement cases; Zambia.

1. Introduction

For a long time in Zambia, the process of justice administration in penetrative defilement offences has been questionable and many times has fallen short of the internationally acceptable standards in terms of the standard of proof used in penetrative defilement cases involving girl children below 8 years old and imbeciles by seemingly having embraced *Hebert packers*¹ crime control model contrary to constitutional provisions in Article 18² for an adversarial system as observed in *Daka v The people* (SCZ Appeal 333 of 2013)³ and many other cases. Currently there is no empirical evidence describing how DNA evidence has been used in resolving sexual crimes in Zambia and no scientific protocol exists for the handling of these cases despite the greater need that exists if equitable justice administration is to be attained. The contributing factors include inadequate infrastructure, limited skilled/specialised workforce in the criminal justice system, economic constraints and inadequate policy guidelines among others. This study took interest in the effects that arise because of inadequacies in the criminal justice system to both victims of penetrative sexual offences involving girls below the age of eight (08) years or imbeciles and male suspects who may turn victims. Knowledge through research of inadequacies in the criminal justice system has potential to curb injustices that happen because of the knowledge gap, infrastructure inadequacies, and policy inadequacies among others. A systematic analysis and evaluation of documents, interviews from staff under the criminal justice system and its consumers were key in gathering the necessary evidence. Evidence from the Police

¹ H.L. Packer (1968). The limits of Criminal Sanction, Page 24.

² The Constitution of Zambia (Article 18).

³ *Daka v The people* (SCZ Appeal 333 of 2013).

Criminal investigations department, the National Prosecutions Authority and the courts revealed that justice in these cases is administered on the balance of probabilities rather than beyond reasonable doubt as prescribed by the Criminal Procedure Code (CPC)⁴. On the other hand, unjust convictions of male suspects on the balance of probabilities rather than, beyond reasonable doubt shall be prevented. This study was anchored on the general objective of “assessing the administration of justice in penetrative defilement cases in Zambia” and specifically, “To evaluate how convictions or exonerations are secured in penetrative defilement cases in Zambia and also to determine whether a standard scientific protocol exists or not for handling of penetrative defilement cases in Zambia.”

The study endeavored to answer the following questions:

1. What is penetrative defilement?
2. How is justice administered in penetrative defilement cases?
3. How are convictions secured in penetrative defilement cases?
4. Does Zambia have a scientific protocol for penetrative defilement cases?
5. What Law(s) governs penetrative defilement?

2. Literature Review

Justice still remains a farfetched dream for many African communities especially those from rural and under privileged settings⁵. This narrative is true for Zambia. It is important to note that the Zambian law has evolved to accommodate children’s rights. Before the year 1998, there were no accessible statistics on cases of defilement reported to the Zambia Police Service. By the year 2004, there were 1375 reported cases; while in 2005, the reported cases drastically reduced to 132. This could have been due to the amendment of the Penal Code by Act No. 15 of 2005 which introduced the minimum mandatory sentence of 15 years on those convicted of defilement. However, in the year 2006, the number sharply rose to a colossal 2668. In 2008, the number of reported cases was at 1224. Of the 1224 cases, 516 were taken to court. Of these, there were only 150 convictions. In the year 2013, there were 2234 reported cases. Of these, 1050 cases were taken to court and out of which there were 292 convictions and 40 acquittals while 30 cases were withdrawn. The cases pending before the court were 578 while 109 cases were withdrawn at the Police station⁶.

In Zambia, oftentimes defilement occurs where children are more vulnerable to the adults in a position of power and authority over them. Children’s rights activism in the country eventually led to a sharp rise in the number of defilement cases that were reported and prosecuted. Due to the increase in the reported cases of defiled children, most of whom were girls, this lead to the enactment of the law on defilement.

In African countries including Zambia, sexual abuse has been found to be exacerbated by social conditions that increase chances of children falling victim; that is, patriarchal system which promotes male dominance over the

⁴ Criminal Procedure Code (CPC Part IV).

⁵ World Health Organization, Geneva (2004). Changing history, Chapter 2, Pages 32-38.

⁶ National Gender Based Crime Statistics for the year 2013 by Zambia Police Service, Victim Support Unit, Page 125.

females. Due to the patriarchal system, many men feel they have the right to sexual dominance over women and girls. However, this statement can be argued as male dominance over females can be attributed to the genetic make-up of men that results in high amounts of testosterone in blood after puberty, a hormone associated with expression of dominance in order to secure mating rights⁷.

Particularly, great concern arises when vulnerable or constitutionally described as incapable individuals are in the mix of these sexual violations. The complexity of handling these matters coupled with public outcry, human emotions, sympathy, empathy and inadequacies in infrastructure, equipment, personnel and policies to handle these matters makes the administration of justice in these instances a challenge by the criminal justice system and worth evaluating from time to time bearing in mind that crime is also described as a “*moving target*”. The vulnerable categories in this context are those of imbeciles, girl children ≤ 8 years and male suspects when they are victims/suspects in penetrative sexual offences, without what the honourable courts would term sufficient, and in the absence of Forensic techniques of suspect identification, may lead to a “*hurt and help situation*” in the sense that the uncollaborated evidence of this category may lead to an acquittal while justifiable collaboration leads to convictions even when it may be false. Let us examine these scenarios:

World over, with the exception of a few places such as Muslim communities, gender based violence against women and girl children has increasingly created debates due to public outcry from victims, victims’ families, pressure groups, NGOs, and the community at large. Child sexual abuse is a perennial global problem, with sub-Saharan Africa having a high prevalence of incidents⁸. Global statistics reveal that one in five women and one in thirteen men report they were sexually abused as a child aged 0-17 years. Similarly, 120 million girls and young women under 20 years of age report having suffered some form of forced sexual contact. Sexual abuse and exploitation of children violates human rights and is a public health problem with significant consequences for global health and development.

Child sexual abuse is a form of child abuse in which an adult or older adolescent uses a child for own sexual satisfaction. Definitions of sexual abuse include asking or forcing a child to engage in sexual activities, offensive exposure (of the genitals, female nipples) to a child with intent to gratify one’s own sexual needs or to intimidate or groom the child into sexual activities, physical sexual contact with a child, and or using a child for the production of child pornography⁹. Suffice to say that child sexual abuse may take different forms including physical contact to non-physical contact sexual abuse including sexual harassment, touching, incest, defilement, rape or exploitation in prostitution or pornography, exposure to pornographic materials and exposure to one’s private parts for personal satisfaction, for economic or whatever reasons. Although the child’s own home or the perpetrator’s home are the most common locations where abuse takes place, child sexual molestation can occur in all the settings in which children spend their time including day cares, schools, justice institutions, on roads, fields and churches. Among the child sexual abuses is penetrative defilement which involves the actual entry of the male genital organ (Penis), and or body parts such as fingers into the vagina of the minor (<16 years old) in Zambia with or without their consent as

⁷ Siddhartha Mukherjee (2016). *The gene: An intimate history* New York: Scribner, Pages 120-135.

⁸ Zambia Police Service, Gender Based Violence; Victim Support Unit Experience, Printed in 2014 with support from UNICEF, Pages 101-109/National Gender Based Crime Statistics for the year 1998–2011 by Zambia Police Service, Victim Support Unit.

⁹ UNICEF (2020). *Justice for Children*, Page 10.

consent is immaterial in minors. This is very crucial in brining culprits to book based on locard's principle of exchange of material with the application of forensic science.

In most of the countries reviewed for this study, the legal framework consists of the Constitution, legislative enactments and common law mostly as inherited from former colonial masters. Other sources of law included African customary law, Islamic or Sharia law and international human rights principles as embodied in legislation and the countries respective Constitutions. Half of the twelve countries reviewed Botswana, Malawi, Kenya, Tanzania, Uganda and Zambia are common law countries, modelled after the English legal system having been colonised by the Britons¹⁰. Although most criminal offences have been codified in a Penal Code, the interpretation and application of the law is governed by common law (judicial precedent) based largely on English law. However, it must be noted that using judicial precedence sometimes results in the perpetuation of wrongful judgements until such a time when procedures or processes are questioned by research through the administration of standards such as the Fryer test and Daubert's test¹¹. In addition, as most of the penal code provisions in these countries were "inherited" from England during the period of colonial rule, the law and procedure for rape and other "Offences against Morality" have remained almost identical across the six countries until recently. For instance, the court system in Botswana, Malawi, Kenya, Tanzania, Uganda and Zambia consists of the High Court and Subordinate or "magistrates" courts.

With the exception of South Africa that has made tremendous strides in the utilisation of DNA evidence to convict or exonerate suspects, evidenced by recent remarks of the Police Minister Mr. Bheki Cele about over 98% clearance on DNA backlog analysis for sexual offences in 2023, the rest of other countries can be said to be merely administering justice on the balance of probabilities to a larger extent¹².

The Zambian 2021 Third Quarter GBV Crime Report shows that 685 Sexual Offences were recorded representing 17% of all the reported cases. Out of these, 512 victims were girls translating to 74.8%, 153 victims were women translating to 22.3%, 14 victims were boys translating to 2 %, whilst six (6) victims were men translating to 0.9%. Still under Sexual offences a total of 496 cases of Child defilement translating to 72.4% were recorded, of which 486 were girls and 10 were boys, representing 98% and 2% of all the reported defilement cases respectively. Lusaka Province recorded the highest number of child defilement cases with 130 cases translating to 26.2% of all child defilement cases reported countrywide. Central Province recorded 81 cases translating to 16.3%, followed by Southern Province with 75 cases translating to 15.1%. Eastern Province recorded 65 cases translating to 13.1% and Copperbelt Province recorded 46 cases translating to 9.3% of all the reported defilement cases. North Western recorded 27 cases translating to 5.4%, Muchinga Province recorded 25 translating to 5% Western Province recorded 22 translating to 4.4%. Northern Province recorded 21 cases translating to 4.2 % and Luapula recorded four cases of Defilement representing 0.8% of all reported Child defilement cases respectively¹³. These statistics are mainly from areas along the line of rail where communities are knowledgeable about sexual violations and offences. It is a different story in rural and less educated communities as these vices and violations are not viewed as such due

¹⁰ O'Donovan, M., & Redpath, J. (2006). The impact of minimum sentencing, Page 23.

¹¹ Bruce R. Moran (2011). Crime reconstruction, Page 44.

¹² <https://www.sanews.gov.za>.

¹³ Zambia Police Service annual Crime report (2021). Gender based violence case statistics, Page 2.

to traditions and cultural norms about sexual offences. In fact, there may be more of sexual violations in rural communities than there are in the cities except that in the later such vices are reported to the Police.

3. Methodology

This was a Retrospective cohort study (Quantitative and Qualitative in nature). Criminal investigative documents and records from institutions under the justice system involving defilement of girls ≤ 8 years and imbeciles were reviewed from the year 2016 to the year 2021. These documents included only those with parameters relating to penetrative defilement of girl's ≤ 8 years old and female imbeciles of any age. Questionnaires were also administered to acquire data from convicts in the subject offence. The collected data was then analysed using risk ratios, graphs, charts and tables to establish if a relationship exists between the identified cohorts and injustice in the administration of justice in penetrative defilement cases.

This research was conducted between January 2022 and December 2023 in Lusaka Province, Lusaka District of the Republic of Zambia at the Zambia Police Service Headquarters Criminal records department and Lusaka Division (Kanyama Police Station), courts of jurisdiction for these offences (Magistrate court Complex Juvenile Courts), UTH PCoE (Child Sexual Abuse Unit) and Lusaka Central Correctional facility where inmates in concerned offences serve jail terms (focused target group).

Purposive sampling of available dockets between 2016 and 2021 i.e. one in every five until fifty documents were reviewed (1, 6, 12, 18, 24 and so on) from the Zambia Police Service CID forwarded or not forwarded to the National Prosecutions Authority and purposively sampled dockets in the same manner of one in every five dockets from National Prosecutions Authority forwarded to the courts for prosecution involving suspected defilement of girl children less than or equal to 8 years old and or imbeciles.

Similarly, purposively sampled Judgement files i.e. one in every five from the courts in defilement cases involving girl children less than or equal to 8 years or imbeciles between 2016 and 2021.

Descriptive statistics (means, medians, ranges etc.) were used to describe populations. Parameters that were analysed include age of defiled children, percentage of each category's, possible judgement outcome that is Acquittal, Discharge, Conviction and Nolle Prosequi. Since most of the data collected under specific objectives was qualitative, SPSS V26, was used for statistical analysis, which produced descriptive and inferential outputs (Both statistics and graphical).

Statistical tests where at 5% significance level. Inferential statistics by Paired Sample Tests, Posterior distribution, T- Tests, and Bayesian Independent, were used to compare means of values between groups. Spearman's rho and Pearson correlation coefficient tests were used to test both the negative and positive relationships of variables. Regression was used to test the relationship of all independent variables.

4. Results and Discussion

The findings of this study revealed that the adopted scientific methods and tools are inadequate for equitable justice administration in penetrative defilement cases in Zambia, and that penetrative defilement cases are heard on the balance of probabilities rather than beyond reasonable doubt, and most significantly, a scientific protocol for handling penetrative defilement cases does not exist.

The results from the key players in the justice system in penetrative defilement cases have punched a lot of legal and scientific holes in the current trends that need addressing and review from time to time. The judicial outcome inconsistencies are a great source of concern. It has also been shown that available and reviewed pieces of legislature and other material seem to have a bias towards the understanding of who is a victim and previous researchers did not take into account secondary victims in sexual offences i.e. innocent male suspects some of whom have served long deterrent terms unjustly due to this omission by law enforcers and magistrates and judges alike. It is for this reason that this study strongly suggests a review of all defilement cases in Zambia past and presents to have a chance to correct matters and administer justice equitably.

The data collected and analysed from PCoE child sexual abuse unit in the period under review showed a 1.27%(2016), 1.14%(2017), 0.46%(2018), 1.01%(2019), 0.33%(2020) and 0.003%(2021) syphilis infection rate from a total number of 1341, 1315, 1315, 1377, 1221 and 1097 cases reported respectively. Although this infection rate seems low, it is statistically significant as the effects of *Treponema pallidum* can be devastating on individuals' years after the infection including mental instability in some untreated cases. Suffice to say that despite these positives being associated with acts of defilement, no scientific proof was provided to show that the infections were because of the defilement. Similarly, 0.75%(2016), 1.37%(2018), 0.07%(2019), 0.08%(2020) and 0.36 % (2021) Hepatitis B virus infection rate from a total number of 1341, 1315, 1315, 1377, 1221 and 1097 respectively. Preventing these defilements would lead to reduced or no spread of these infections through this route to innocent children and imbeciles thus avoiding the undesirable consequences.

Another review of the documents showed a total of 44.7%(2016), 60.84%(2017), 76.0%(2018), 72.6%(2019), 88.5%(2020) and 98.5%(2021) out of a total of 1341, 1315, 1315, 1377, 1221 and 1097 respectively for specimens that were processed for positive spermatozoa test. This positive improvement trend is encouraging and key towards the migration to methods that ensure equitable justice administration for both victims and suspects. Despite the good spermatozoa identification percentage, a disturbing 0% for specimens processed for DNA matching with suspects call for serious worry and improvement if prevention of abortion of equitable justice administration is to be attained. Another revelation of the collected and analysed information about the total number of cases for which UTH-PCoE child sexual abuse unit experts were engaged or invited to court for testimony, showed low engagements of 2.24%(2016), 3.04%(2017), 3.04%(2018), 1.09%(2019), 1.23%(2020) and 1.82%(2021) out of a total of 1341, 1315, 1315, 1377, 1221 and 1097 respectively. This evidence shows how less the players of the justice system engage and most likely the little desire by the courts to use expert witnesses and evidence for equitable justice administration.

A 0% use of scientific evidence and 100% use of non-scientific evidence to prosecute suspects by the National Prosecutions Authority (NPA) is a drawback in terms of equitable justice administration, as this practice does not inspire confidence in the process. Varied judgement outcomes of 70% Convictions, 10% Acquittals, 12.5% Discharges and 7.5% Nolle prosequi are a source of concern especially when parameters during prosecution remained almost the same in the reviewed cases.

A review of Correctional facility records and interviews with inmates revealed a worrying 100% conviction rate with all the interviewees denying or having not been aware of any scientific process before or during trial such as

blood collection, hair sample collection, buccal swabs, etc. Another worrying revelation was the unavailability of legal representation during trial which raises questions about the role of the Law association of Zambia in providing “Pro bono services”. A small fraction of convicts that had an idea about legal representation disclosed that they only met/ interacted with a lawyer during sentencing because this is a requirement.

Evidence from reviewed documents from the Magistrates Courts Complex in Lusaka under juvenile courts in the period under review, highlighted 50% conviction, 12% Acquittal, 18% Discharge and 16% Nolle prosequi out of 50 court documents. However, these varying judgment outcomes are against a background of similar trial circumstances including 100% rate of non-utilization of scientific evidence. This narrative suggests that even when the courts may be aware of the dangers of false imprisonment, pressure from society, pressure groups, women movement groups, feminist Organisations, among others, forces the judges and magistrates to go ahead even in the absence of ideal trial circumstances of beyond reasonable doubt, to deliver judgments. The down side of judicial precedence in the circumstances cited above is that an accepted initial wrong judgment (precedent) will continue to perpetuate an injustice until a question is asked about the precedent and if not challenged, equitable justice administration may not be attained.

Documents made available and reviewed after return from the courts, from the Zambia Police Service CID/VSU sampled from the populous Kanyama Police Station highlighted 50% conviction, 14% Acquittal, 8% Discharge, 20% Nolle prosequi decisions, 8% of imbecile defilements, 0% provision of Scientific evidence and 100% provision of non-scientific evidence. Interviews with CIO’s (Detectives) and VSU officers suggest that despite officers being aware of constitutional provisions regarding evidence beyond reasonable doubt, the limiting environment in which they operate, leaves them with little option but to proceed with processing and forwarding of the dockets to NPA.

5. Conclusion and Recommendations

It can be therefore concluded that the Zambian Criminal Justice system is yet to live up to the “Beyond Reasonable Doubt Concept” as enshrined in the CPC. However, evidence suggests the embrace of Hebert Packer’s crime control model intentionally or unintentionally regarding justice administration in penetrative defilement cases. 99.5% use of non-scientific evidence (Collaborative evidence) and 0.5% use of forensic evidence in the sampled cases sums up the case. Therefore, it is recommended that a scientific protocol for the handling of penetrative defilement cases be developed, expertise and infrastructure in line with penetrative defilement cases be improved. In line with equitable justice administration, a review of penetrative defilement cases in Zambia can be a step in the right direction.

Declarations

Source of Funding

This study did not receive any grant from funding agencies in the public, commercial, or not-for-profit sectors.

Competing Interests Statement

The authors declare no competing financial, professional, or personal interests.

Consent for publication

The authors declare that they consented to the publication of this study.

Authors' contributions

All the authors took part in literature review, analysis and manuscript writing equally.

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